(1)

91-817

No. _____

In The

Supreme Court of the United States

October Term, 1991

NOVARRO C. STAFFORD, M.D.,

Petitioner,

v.

BROTMAN MEDICAL CENTER,
ALEXANDER DUBELMAN, M.D.,
GENERAL HEALTH SERVICES,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of California

PETITION FOR WRIT OF CERTIORARI

ARLENE JOYCE
Counsel of Record for Petitioner
752 Norvell Street
El Cerrito, California 94530
(510) 527-4444

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. May an overloaded state court system use highly technical dismissals for delay in prosecution, with little regard for the reasons for the delay, as a means to reduce its civil caseload without violating litigants' constitutional rights to due process and equal protection?

2. Are civil litigants denied due process and equal protection in a state court system where proceeding to a trial on the merits depends more upon a plaintiff's luck of the draw of the judge in the trial court, or obtaining review by a particular panel of a Division of a Court of Appeal, than upon the circumstances of the case?

3. Is the application of a state's statutes for delay in prosecution in violation of a civil litigant's constitutional right to equal protection when his case is dismissed on facts virtually identical to other litigants who were allowed to proceed to trial?

4. Is the application of a state's statutes for delay in prosecution a violation of a civil litigant's constitutional right to due process when his case is dismissed on the eve of his scheduled trial for the purported reason that he had failed to obtain an **earlier** trial date, notwithstanding that court errors and practices prevented an earlier trial date?

5. Is a civil litigant denied due process when the reviewing court affirms his dismissal on grounds which were not raised in the trial court where he could have presented evidence on the issue?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review a decision of the California Court of Appeal, Second Appellate District, Division Five, as to which review was denied by the California Supreme Court.

OPINIONS BELOW

The decisions of the California Supreme Court denying review, and the California Court of Appeal affirming the judgment of the trial court were not published; the appellate and trial court rulings appear in the Appendix.

JURISDICTION

Judgment in the trial court was entered November 29, 1989. The judgment was affirmed in an opinion entered by the California Court of Appeal, Second Appellate District, Division Five on June 3, 1991. Review was summarily denied by the California Supreme Court on August 21, 1991. No rehearing has been granted or extension obtained. Jurisdiction to review a state court final judgment where rights under the Constitution of the United States are claimed is conferred by 28 U.S.C. § 1257(a). Pursuant to Rule 14(h), a more complete statement of jurisdiction is contained in the Statement of the Case at Part III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the following constitutional provisions, statutes and rules of court appear in the Appendix:

1. Section 1 of the Fourteenth Amendment to the United States Constitution.
2. California Code of Civil Procedure § 583.130
3. California Code of Civil Procedure § 583.320(a) (3)
4. California Code of Civil Procedure § 583.340(c)
5. California Code of Civil Procedure § 583.410
6. California Code of Civil Procedure § 583.420(a)(3)(C)
7. California Rules of Court, Rule 209(a)
8. California Rules of Court, Rule 210
9. California Rules of Court, Rule 223
10. California Rules of Court, Rule 373(e)

STATEMENT OF THE CASE

Recently retired California Supreme Court Justice Marcus M. Kaufman has charged that the California

courts are improperly using state dismissal statutes to clear their civil dockets, and that "the primary goal appears no longer to be justice for the litigants, but simply disposing of the crush of cases as fast as possible." Kaufman, *Crisis in the Courts*, California Lawyer, August, 1990, at 28. In one of many examples, Justice Kaufman points to highly technical dismissals for delay in prosecution with little regard to the reason for the delay.

Petitioner is a victim of such a dismissal. Petitioner's case was dismissed for delay in prosecution just five days before his scheduled trial, where the trial court ignored the fact that much of the delay was caused by a prior appeal which reversed a judgment on the pleadings and also by court errors in scheduling a trial date which Petitioner had attempted to correct. The reviewing court affirmed the dismissal on grounds which were not raised in the trial court. In the rush to strike one more case from the system, the trial court used an inappropriate standard to measure Petitioner's conduct, and the Court of Appeal misread two cases it relied upon.

Petitioner asserts that the improper use of state court dismissal statutes is a violation of his, and all other California civil litigants, Fourteenth Amendment rights.

Because a plaintiff's reasonable diligence in prosecuting his action is the measure California courts are required to use in applying state dismissal statutes, in order to establish the arbitrary nature of the state court rulings, Petitioner must necessarily set out in substantial detail his prosecution of this action.

I. THE FACTS

Petitioner Novarro C. Stafford, M.D., ("STAFFORD") was a staff anesthesiologist on the monthly rotation or "call" schedule of the anesthesiology department of the Brotman Medical Center ("BROTMAN") from 1975 to

1980. As a staff physician, Petitioner received an annual or biennial appointment to his position. Once appointed, a staff physician's position vests and he is entitled to reappointment until removed for cause in a proceeding affording due process. *Anton v. San Antonio Community Hospital* 19 Cal.3d 802, 824-825, 140 Cal.Rptr. 681 (1977).

In 1980 Petitioner was terminated from the call schedule by BROTMAN's newly appointed Chief of Anesthesiology, Dr. Alexander Dubelman ("DUBELMAN"), who explained his reasons in a declaration he submitted in support of Respondents' initial motion for summary judgment:

> My decision [to remove STAFFORD from the call schedule] was not based upon a question of Dr. STAFFORD's competence but was rather based upon my desire to work with anesthesiologists on whom I could rely and with whom I could get along.

In his declaration, DUBELMAN stated that he knew removal of Petitioner's name from the rotation schedule would "adversely impact Dr. STAFFORD's income." Following his termination, Petitioner requested, but was denied, an administrative hearing.

II. PROCEEDINGS BELOW

On October 2, 1980, Petitioner filed a civil complaint in the Los Angeles Superior Court alleging five causes of action including breach of contract, and four tort causes. The breach of contract and three tort causes name defendant BROTMAN; the four tort causes name defendant DUBELMAN.

On November 26, 1980, Respondents demurred to the complaint, claiming that Petitioner's termination from the call schedule was the result of a policy decision to "close" the staff, and that prior to suing for damages, Petitioner

had to prevail on a mandamus petition challenging the basis for the policy decision.

The demurrer was partly sustained; on February 25, 1981, Petitioner filed an amended complaint, adding the allegation that he had requested a hearing, and appending a copy of BROTMAN's fair hearing plan. Respondents answered on April 3, 1981. On April 14, 1981, Petitioner filed an at-issue memorandum to place the case on the court's "civil active" list in order to be assigned a trial date (Cal. Rules of Court, Rule 209(a), App. 24).

In 1981 the depositions of Petitioner and the major defense witnesses (including defendant DUBELMAN and Dan Lang, M.D., BROTMAN's Medical Director) were taken. Additionally, Petitioner responded to Respondents' interrogatories.

On October 18, 1982, Respondents filed a motion for summary judgment, based on the same grounds as its demurrer. The motion was denied on November 4, 1982.

On May 2, 1983, Petitioner's case was consolidated with the case of Cary G. Brooks, M.D. (another anesthesiologist, who, like Petitioner, had been terminated from the rotation schedule). Since the *Brooks* action had the lower court case number, the trial court processed the filings after consolidation under the *Brooks* number.

On December 13, 1983, Respondents filed a motion for judgment on the pleadings on identical grounds as the demurrer and motion for summary judgment. On March 2, 1984, the motion was heard and granted without leave to amend for lack of jurisdiction. On April 23, 1984, Petitioner filed a motion to vacate the judgment; the motion was denied.

Respondents' motion for a judgment on the pleadings was also granted in the *Brooks* action. Brooks elected not to pursue an appeal, and dismissed his action in exchange for a waiver of costs from BROTMAN. As part

of the settlement, Brooks agreed not to testify against BROTMAN.

Petitioner appealed and the judgment on the pleadings was reversed by the Court of Appeal; its remittitur issued on December 22, 1986, requiring a trial on or before December 22, 1989 (Cal. Civ. Proc. § 583.320(a)(3), App. 22). The decision allowed Petitioner to directly pursue his breach of contract action against defendant hospital, however, if Petitioner elected to continue pursuit of his tort causes against the hospital, it required him to first amend that portion of his complaint and obtain review of the hospital's actions in a traditional mandate proceeding. The opinion did not mention Petitioner's claim against defendant DUBELMAN (who would not have been subject to a mandate proceeding).

After analyzing the appellate decision, Petitioner's counsel concluded that Petitioner should pursue the direct action for breach of contract against BROTMAN, abandon the tort causes against BROTMAN, and pursue the tort causes against DUBELMAN.

In approximately May, 1987, the law firm which had handled the appeal for Petitioner dissolved; Petitioner subsequently retained one of the attorneys who had worked on the appeal to take his case while he located trial counsel. Petitioner's counsel submitted a document production in November, 1987, requesting from Respondents all documents relating to Petitioner's employment status with BROTMAN, and all personnel manuals, etc.

In December, 1987, Petitioner's counsel telephoned the Los Angeles Superior Court's calendar clerk's office to inquire regarding the status of a trial date. Counsel was advised that the calendaring system was in chaos because the court was in the process of initiating a new "fast track" system, and was requested to call back in several months.

BROTMAN objected to the document production on the grounds that no action was pending in that Petitioner had not amended his complaint and exhausted his administrative remedies. Petitioner filed a motion to compel further responses, which was heard and granted on March 15, 1988.

Following the hearing on Petitioner's motion to compel, Petitioner's counsel visited the calendar clerk's office, and after explaining the procedural status, inquired about a trial date. The clerk requested counsel to bring the court file to her office. Counsel searched the court records and eventually located Petitioner's file in the court's closed archive files under the *Brooks* number, which had been sent to the archives upon Brooks' dismissal of his action.

Counsel brought the two court files to the clerk's office, and after reviewing the files, the court clerk concluded that Petitioner's case should have been returned to the civil-active list after the court received the remittitur, however, the remittitur had been inadvertently filed in the now-closed *Brooks* file. Counsel was advised that Petitioner should receive a notice regarding a trial date within six months.

Over the course of the next six months, STAFFORD's counsel repeatedly telephoned Respondents' counsel for the documents ordered to be produced. Finally, upon threat of a sanctions motion, on September 1, 1988, Respondents produced only the hospital's Fair Hearing Plan (which Petitioner had attached to his amended complaint) and stated "no [other] documents . . . exist".

In October, 1988, Petitioner's counsel again visited the calendar clerk's office to advise that Petitioner had not yet received the trial setting notice, and counsel was again requested to bring the file to the clerk. Counsel again located the court file in the archive files with the

closed *Brooks* matter. Counsel returned Petitioner's file to the calendar clerk's office and was again assured that Petitioner would be sent a notice regarding a trial date within six months.

In February, 1989, Petitioner secured trial counsel who commenced a review and analysis of the complex legal and factual issues in the case. On May 18, 1989, Petitioner's new counsel served a production request on BROTMAN, seeking documents relating to Petitioner's appointment to and termination from BROTMAN's medical staff. BROTMAN objected to all production on the grounds that Petitioner had failed to exhaust his administrative remedies.

On July 21, 1989, Petitioner filed his second motion to compel production and for sanctions, which was heard on August 11, 1989. The court ordered only a partial production, accepting BROTMAN's argument that the matter was a mandamus proceeding, and limiting discovery on that basis.

On August 18, 1989, Petitioner filed a motion for reconsideration of the limited discovery order. On that same date, because Petitioner still had not received a notice from the court regarding setting a trial date, Petitioner's counsel visited the court clerk's office to obtain a date for a motion to specially set for trial. At the suggestion of the clerk, Petitioner requested a status conference to obtain the trial date rather than the motion to set. Petitioner's motion for reconsideration of the discovery order was initially set for hearing on September 6, but continued by the court to September 28, 1989. The status conference was set by the court for the same date.

Petitioner's motion for reconsideration of the discovery order was granted. Substantially all documents requested were ordered to be produced. At the status conference, the court assigned a trial date of November

27, 1989, without objection from defense counsel. The pre-trial order issued at the status conference required the completion of all discovery by November 10, 1989.

On October 17, 1989, Respondents filed a motion to dismiss for delay in prosecution under Cal. Civ. Proc. § 583.420(a)(3)(C) (App. 23). The motion and supporting attorney declarations claimed prejudice from lost files, unavailable and terminally ill witnesses, dimmed memories and changes in ownership and administration of the hospital. (Respondents' claims of prejudice are discussed in footnote 3, *infra.*)

On November 8, 1989, Petitioner filed a motion for sanctions for BROTMAN's failure to comply with the two outstanding discovery orders. On November 9, 1989, Respondents filed a motion for summary judgment. The motion was supported by declarations from the two principal defense witnesses (Lang and DUBELMAN) wherein they made no claim of lapse of memory.

Petitioner timely filed opposition papers to the dismissal and summary judgment motions. The hearings on Petitioner's sanctions motion and Respondents' two motions were held on November 22, 1989, where Respondent's dismissal motion was granted and the others not ruled upon (App. 1). Petitioner's action was dismissed just five days prior to the scheduled trial, after completion of discovery and one month prior to the date for mandatory dismissal.

Petitioner filed a motion to reconsider the dismissal which was heard on December 22, 1989, and denied (App. 3). Petitioner timely filed a notice of appeal. On June 3, 1991, the Court of Appeal affirmed the dismissal (App. 4). Petitioner timely filed a petition for rehearing which was summarily denied (App. 18). Petitioner timely filed a Petition for Review with the California Supreme Court which was summarily denied on August 21, 1991

(App. 19). (The Court of Appeal opinion affirming the dismissal and the arguments on appeal are discussed below.) A Remittitur Notice was issued by the Court of Appeal on September 17, 1991 (App. 20).

III. PRESENTMENT OF FEDERAL QUESTION

As will be explained, California jurists have complained that the state courts are improperly using the dismissal statutes as a means to clear their overloaded dockets in violation of litigants' right to their day in court. The jurists point to highly technical dismissals for delay in prosecution where little regard is given to the reason for the delay.

Petitioner is a victim of such a dismissal, and asserts that the use of state dismissal statutes for the purpose of clearing overloaded dockets is a violation of his and other litigants' due process rights under the United States Constitution.

Moreover, in California some litigants, such as Petitioner, are denied the right to trial on facts virtually identical to others who are allowed to proceed, in violation of Petitioner's and other litigants' equal protection rights under the Fourteenth Amendment.

Whether a state's procedural practice is so unfair as to deny due process is always a federal question. *Cronnon v. State of Alabama* 557 Fed. 2nd 472, 473, n.1 (5th Cir., 1977).

A Petitioner's objection to the denial of federal due process and equal protection need not cite "chapter and verse" to the United States Constitution. *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n. 9., 71 L.Ed. 2d 1, 102 S.Ct. 869 (1982). For example, in *Taylor v. Kentucky*, 436 U.S. 478, 482, n.10, 56 L.Ed.2d 468, 98 S.Ct. 1930 (1978), this Court accepted jurisdiction where Petitioner at trial had 'invoked "fundamental principle[s] of judicial fair play," '

in that such an invocation "should have sufficed to alert the trial judge to petitioner's reliance on due process principles." If the record as a whole shows that a petitioner intended to rely upon due process and equal protection principles, the claim is regarded as adequately presented. *See New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 73 L.Ed. 63 (1928).

Throughout his pleadings filed below, Petitioner has invoked fundamental principles of judicial fair play and equal treatment.[1] Under the authorities cited above, such assertions were sufficient to place the courts on notice that Petitioner was asserting his Constitutional rights to due process and equal protection under the Fourteenth Amendment.

In his opposition to the dismissal motion, Petitioner asserted his due process rights as follows:

> In the interests of justice, plaintiff requests that he be given his day in court in order to vindicate his rights . . .

Petitioner's right to due process was not addressed in the trial court's judgment of dismissal.

In his motion for reconsideration of the dismissal order, Petitioner asserted his due process rights as follows:

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[1] This Court must recognize that civil litigants in routine state court proceedings do not explicitly invoke their Fourteenth Amendment rights regarding the application of routine state procedural law. Such litigants expect that state law will be fairly applied based on principles of due process and equal protection, and if a trial court errs, the error will be corrected on appeal. Therefore, if this Court strictly applies Rule 14(h) to petitions which challenge the application of routine state civil procedural law as violating Fourteenth Amendment rights, it will effectively preclude the review of all such cases no matter the egregious nature of the state court conduct.

> The discretion of the trial court to dismiss an action is not a capricious or arbitrary discretion but one controlled by legal principles which is to be exercised in accordance with the spirit of the law and with a view to subserving rather than defeating the ends of justice.

Petitioner's right to due process was not mentioned in the trial court's denial of the motion to reconsider.

In his Opening Brief on the appeal, Petitioner challenged the improper use of state dismissal statutes as violating due process in the following manner:

> Although the trial court's stated reason for granting the dismissal motion was STAFFORD's "obvious delay" in prosecution and the "obvious prejudice" to defendants, STAFFORD asserts that since he did prosecute his case with reasonable diligence, and no evidentiary support was offered for the claims of prejudice to the defendants, the more likely reason for granting the dismissal motion was to weed one more case out of the system.
>
> The overcrowding of the courts was recently addressed by (retired California Supreme Court) Justice Marcus M. Kaufman, in the August, 1990, issue of *California Lawyer*, at page 28:
>
> > Clearly the most serious problem facing the California justice system is overload, which is adversely affecting the delivery of justice at all levels. In both the trial and appellate courts, the primary goal appears no longer to be justice for the litigants, but simply disposing of the crush of cases as fast as possible.
> >
> > In the trial courts we are seeing an atmosphere close to coercive in settlement conferences, **dismissals for nonprosecution**

> **with little regard for the reason for the delay,** and inflexible fast-track rules and time limitations that make the outcome of litigation dependent on the resources of litigants and their attorney.
>
> The courts of appeal seem to be relying more on highly technical dispositions such as dismissals for untimely filings, where in the past some means to save the appeal would have been found.

Kaufman, *Crisis in the Courts*, California Lawyer, August, 1990, at 28. (Emphasis added.)

Petitioner's assertion of his due process rights was not commented upon in the opinion by the Court of Appeal.

In his Petition for Rehearing to the Court of Appeal Petitioner asserted his Fourteenth Amendment equal protection rights in the following manner:

> In summary, any distinctions between the cases cited [where the plaintiffs had been allowed to proceed to trial] and Appellant's case are insignificant. Similar cases must be treated the same, else the Court is guilty of acting upon considerations other than law. The ultimate civil penalty of dismissal mandates greater evidence of misconduct than anything found in this record.

Petitioner again asserted his due process claim by citing the above passage from the article by Justice Kaufman, as well the dissent by Justice Johnson in *Mesler v. Bragg Management Company, Inc.* 219 Cal.App.3d 983, 268 Cal.Rptr 522 (1990), including the following passage:

> [T]his court and other appellate courts have only been paying lip service to the Legislature's clearly stated policy [in California Code of Civil Procedure § 583.130] on behalf of the people of California that a trial on the merits is preferred over dismissal for lack of diligent prosecution.
>
> . . .

> Why . . . has it proved so difficult to convince courts section 583.130 means what it says? It may be because we are so caught up in the problem of trial court delay and attempts to reduce it . . . the chance to strike a case from the docket is almost irresistible. . . . But, the minute we allow our decisions to be controlled by statistics instead of statutes we abandon our role as judges and become bureaucrats in black robes.

Id., at 219 Cal.App.3d 996-999.

The Court of Appeal summarily denied the petition for rehearing.

In his Petition for Review to the California Supreme Court, Petitioner asserted his due process rights by setting out the above cited passages from Justices Kaufman and Johnson in challenging the improper use of the state dismissal statutes, and further asserting his due process and equal protections rights as follows:

> [A]fter a case has been pending for several years, proceeding to a trial on the merits presently depends more upon a plaintiff's luck of the draw of the judge in the trial court, or obtaining review by a particular Court of Appeal, Division or panel, than upon the circumstances of the case.

The California Supreme Court summarily denied the Petition for Review.

REASONS FOR GRANTING THE WRIT

I

THE OVERLOADED CALIFORNIA COURT SYSTEM IS USING HIGHLY TECHNICAL DISMISSALS FOR DELAY IN PROSECUTION, WITH LITTLE REGARD FOR THE REASONS FOR THE DELAY, AS A MEANS TO REDUCE THE COURTS' CIVIL CASELOAD, IN VIOLATION OF LITIGANTS' DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT.

As set forth above, California jurists have complained that the state courts are improperly using the dismissal statutes as a means to clear their overloaded dockets in violation of litigants' right to their day in court. The jurists point to highly technical dismissals for delay in prosecution where little regard is given to the reason for the delay. In discussing the overloaded California court system, recently retired California Supreme Court Justice Marcus M. Kaufman stated:

> In both the trial and appellate courts, the primary goal appears no longer to be justice for the litigants, but simply disposing of the crush of cases as fast as possible.

Kaufman, "*Crisis in the Courts,*" California Lawyer, August, 1990, at 28.

The tendency of the Courts of Appeal to affirm dismissals for nonprosecution with little regard for the reason for the delay was also discussed in *Mesler v. Bragg Management Company, Inc.*, 219 Cal.App.3d 983, 268 Cal.Rptr. 522 (1990). In dissent, Justice Johnson reviewed the history of California Code of Civil Procedure §583.130, which sets forth the state policy favoring trial on the merits over the policy of denying the plaintiff a trial because of insufficient diligence in the prosecution of the claim. After complaining that California jurists are allowing their decisions to be controlled by the statistics

of their caseloads rather than by statutes, she states with regard to the *Mesler* plaintiff:

> Instead of viewing the "total picture" [citation omitted], the majority is nit-picking. . . .Given the trial setting practices of the Los Angeles Superior Court, waiting nine months before inquiring about a status conference was not unreasonable. . . .In hindsight, it is always possible to identify some step a plaintiff could have taken which he did not take which might have allowed him to get to trial earlier. Indeed I doubt there are very many cases prosecuted in the Los Angeles trial courts where the lawyers are **perfectly** diligent at **every** stage of the proceedings – and that includes those which reach trial in a timely fashion. . . .But perfect diligence is not the standard. . . .The only difference between Mesler and thousands of other plaintiffs who did manage to get to trial in recent years is not that these others were more diligent. The explanation is that in these cases the clerk's office did not lose the plaintiffs' at-issue memoranda.

Mesler, 219 Cal.App.3d 983, 1002-1003. (Emphasis original.)

Dismissing cases for highly technical reasons such as delay caused by court calendaring errors is contrary to California state policy favoring trial on the merits and is repugnant to due process. As explained by this Court in *Truax v. Corrigan*, 257 U.S. 312, 332, 66 L.Ed. 254, 263, 42 S.C. 124, 129 (1921):

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every

> citizen shall hold his life, liberty, property and immunities under the general rules which govern society."

Due process requires fundamental fairness, yet the California court system has been anything but fair to Petitioner. After termination from his employment on the whim of his supervisor, Petitioner commenced this action and won a prior appeal after a judgment on the pleadings. Additionally, he brought or opposed twelve major motions, and completed discovery (including depositions, document productions and interrogatories). His case was dismissed for delay in prosecution just five days before his scheduled trial, because he had failed to obtain an **earlier** trial date. The trial court ignored the fact that Petitioner would have received an earlier trial date had the court's calendaring clerk kept either of her two promises to Petitioner's counsel to send Petitioner a trial setting notice. The promises were made after counsel twice retrieved Petitioner's court file from the closed archives where it had been sent by court error.

After suffering injustice at the trial court where the court not only ignored the facts and equities, but applied the wrong standard to measure Petitioner's conduct in the prosecution of his case[2], Petitioner expected to receive

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[2] The trial court's minute order states, "Nothing is shown why failure to bring to trial was impractical or futile." However, a plaintiff must meet the heavy burden of showing such impracticality or futility only on a motion for **mandatory** dismissal, where he has not secured a trial date within the limitation period. Cal.Civ.Proc. §583.340(c) (App. 22). Here, of course, Petitioner had secured a trial date within the limitation period, and the motion before the court was for **discretionary** dismissal where the standard is the plaintiff's "reasonable diligence" in prosecution. Cal.Civ.Proc. §583.130 (App. 21).

justice from the Court of Appeal. However, the true use by the California courts of the dismissal statutes was revealed to Petitioner when the reviewing court affirmed the dismissal on grounds which were not raised in the trial court (where Petitioner could have presented evidence), and, in the rush to strike one more case from the system, the Court of Appeal misread two cases it relied upon and affirmed incompetent claims of prejudice which have no support in the facts, logic or law.[3] The Court ignored Petitioner's showing of reasonable diligence in prosecution contained in the record on appeal, which established continuing activity on the case, with no period of inaction longer than several months. The Court ignored Respondent's conduct of misrepresentations to the trial court, delays in responding to discovery totalling one year, and repeated rehashing of arguments lost on the prior appeal.

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[3] The Court's misreading of the cases it relied upon is discussed in footnotes 4 and 7, *infra*. Respondents' claims of prejudice are stated in general terms in attorney declarations. Initially, Respondents claim prejudice because they were unable to take the deposition of Dr. Brooks (because he settled with Respondents in 1984, prior to the first appeal in this matter and agreed not to testify against them). This claim of "prejudice" is patent sophistry. Respondents claim prejudice from the loss of hospital minutes of staff meetings, when the minutes asserted to be "lost" are in fact included in the record on appeal, attached as exhibits on Respondents' initial motion for summary judgment. Respondents claim prejudice from dimmed memories of minor witnesses, when they could have taken depositions early in the litigation. *Troupe v. Courtney*, 169 Cal.App.3d 930, 934, 215 Cal.Rptr. 703, 705 (1985). Respondents claim prejudice from loss of the court file, although the record on appeal is complete and neither party was requested to supplement the court record.

Petitioner did not receive the fair treatment to which every litigant is entitled for the sole reason that the courts needed sacrificial lambs and he was in the wrong place at the wrong time.

II

PROCEEDING TO TRIAL ON THE MERITS IN CALIFORNIA PRESENTLY DEPENDS MORE UPON A PLAINTIFF'S LUCK OF THE DRAW OF THE JUDGE IN THE TRIAL COURT, OR OBTAINING REVIEW BY A PARTICULAR PANEL OF A DIVISION OF A COURT OF APPEAL, THAN UPON THE CIRCUMSTANCES OF THE CASE, IN VIOLATION OF LITIGANTS' DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT.

The conflicts of law present on motions for discretionary dismissal in California are the direct result of the use of the dismissal statutes for the improper purpose of clearing dockets. When some courts dismiss cases for any delay in order to reduce their caseloads, conflicts in the decisions arise when other courts follow the state policy favoring trial on the merits. Because the present state of the law is so unclear, plaintiffs have little guidance how to proceed when faced with the delays caused by an overloaded judicial system. Following are examples of some of the conflicts in California law relating to motions to dismiss for delay in prosecution:

The California Courts of Appeal are divided on the standard for measuring plaintiff's diligence in prosecution. Some decisions require only some showing of excusable delay; others require reasonable diligence throughout the action, finding grounds for dismissal for any lapse. For example, in *Pomona Federal Plaza. Ltd. v. Investment Concepts, Inc.*, 203 Cal.App. 3d 217, 249 Cal.Rptr. 757 (1988), *Schmitt v. Superior Court*, 216 Cal.App.3d 453, 264 Cal.Rptr. 806 (1989), and *Hilburger v. Madsen*, 177 Cal.App. 3d 45, 222 Cal.Rptr. 713 (1986), the

plaintiff's lapse in prosecution of each case was excused and the dismissal reversed, in that the whole of plaintiff's conduct was deemed reasonable. However, in *Wong v. Davidian*, 206 Cal.App.3d 264, 253 Cal.Rptr. 675 (1988), and *Mesler v. Bragg Management Company*, 219 Cal.App.3d 983, 268 Cal.Rptr. 522 (1990), a lapse in plaintiff's conduct was the basis for affirming the dismissals, and the whole of plaintiff's conduct was not examined.

The Courts of Appeal are also divided on the issue of delay in trial setting which has been caused in part by court error. Some decisions require a plaintiff to diligently monitor the court's trial setting procedures to ascertain and correct court errors; other decisions do not.

In *Mesler v. Bragg Management Company*, 219 Cal.App.3d 983, 268 Cal.Rptr. 522 (1990), although it was established that court error precluded a timely trial setting, dismissal was upheld for, *inter alia*, plaintiff's failure to closely monitor the clerk's office to learn of the error in trial setting and guarantee its timely correction. However, in *Schmitt v. Superior Court*, 216 Cal.App.3d 453, 264 Cal.Rptr. 806 (1989), where court error precluded a timely trial setting, an order denying a motion to specially set was reversed on a writ petition, notwithstanding plaintiff's delay of almost three years before learning of the co rt error.

The Courts of Appeal are also divided on the issue of prejudice as it relates to a discretionary dismissal motion. Some decisions require a showing of actual prejudice to a defendant attributable to unreasonable delay by a plaintiff (*Hurtado v. Statewide Home Loan Company*, 167 Cal.App.3d 1019, 213 Cal.Rptr. 712 (1985)); others do not address the issue (*Mesler v. Bragg Management Company*, 219 Cal.App.3d 983, 268 Cal.Rptr. 522 (1990)). Some decisions discount general aversions to prejudice (*Hilburger v. Madsen*, 177 Cal.App.3d 45, 222 Cal.Rptr. 713 (1986));

others, such as the instant case, rely upon such claims. Some decisions examine the prejudice caused from an accelerated trial date (*Schmitt v. Superior Court*, 216 Cal.App.3d 453, 264 Cal.Rptr. 806 (1989)); others from the time lapse in prosecution (*Wong v. Davidian*, 206 Cal.App.3d 264, 253 Cal.Rptr. 675 (1988)).

The above conflicts in California law on major issues which are present in discretionary dismissal motions are caused by, and facilitate, the granting by some courts of dismissals primarily to clear dockets, in complete disregard of the Fourteenth Amendment rights of the victims.

III

THIS PETITION PRESENTS AN OPPORTUNITY FOR THE COURT TO ADDRESS THE VIOLATION OF CALIFORNIA CIVIL LITIGANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION BY THE CALIFORNIA COURTS' USE OF THE STATE DISMISSAL STATUTES FOR IMPROPER PURPOSES.

Petitioner's case presents this Court with a highly technical dismissal involving the major issues discussed in the preceding section.

A. PETITIONER WAS DENIED EQUAL PROTECTION OF THE LAWS WHERE HIS CASE WAS DISMISSED FOR DELAY IN PROSECUTION ON FACTS VIRTUALLY IDENTICAL TO OTHER LITIGANTS WHO WERE ALLOWED TO PROCEED TO TRIAL.

In his opposition filed in the trial court and on appeal Petitioner cited many cases where plaintiffs had been allowed to proceed to trial notwithstanding conduct less diligent than his. An example of the disparity in treatment afforded Petitioner is found in *Schmitt v. Superior*

Court, 216 Cal.App.3d 453, 264 Cal.Rptr. 806 (1989). In *Schmitt*, the clerk's office had sent a notice of the trial setting to plaintiff's prior counsel, and when plaintiff's counsel did not appear at the trial setting, the matter was ordered off the civil active list. Over the course of several years, Schmitt's counsel sent several letters to the court inquiring about a trial date. Finally, three months before mandatory dismissal, Schmitt's counsel telephoned the court clerk and learned that the matter had been removed from the civil active list. The court denied Schmitt's motion to set (heard two months prior to mandatory dismissal) and its reconsideration. Schmitt petitioned for a writ of mandate which was granted on the grounds that plaintiff had shown reasonable diligence in attempting to obtain a trial date, but had been stymied by the errors of the court clerk.

Appellant contended on appeal that his facts paralleled those of the plaintiff in *Schmitt*, and for the same reasons the dismissal should be reversed. However, the reviewing court attempts to distinguish *Schmitt* as "inapposite because the appeal court reversed the dismissal of the case, based on serious mishandling by the clerk in not notifying plaintiff's counsel of a trial setting conference which resulted in its dismissal."[4] (App. 16.)

When comparing the court errors in the *Schmitt* case and the instant case, and the conduct of plaintiff's

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[4] The Court also distinguished *Schmitt* by stating, "The appellate court in *Schmitt* also found lack of prejudice to the real party." (App. 16.) The *Schmitt* court actually found a lack of prejudice to the real party caused by an **accelerated trial date**. *Schmitt*, 264 Cal.Rptr. 808. Here, of course, there could be no claimed prejudice as a result of an accelerated trial date in that the trial date was set at the status conference without objection by Respondents.

counsel in the two cases, there is absolutely no significant difference in the facts.

The court clerk in *Schmitt* inadvertently sent the trial setting notice to Schmitt's former attorney, resulting in the case being ordered off the civil active list. The misdirecting of a trial setting notice cannot be termed a more "serious mishandling" by the court clerk sufficient to warrant a different result (as implied by the Court of Appeal) than repeatedly sending Petitioner's files to the closed archives notwithstanding the clerk's promises to the contrary.

Moreover, there is absolutely no significant difference between the conduct of *Schmitt's* counsel and that of Petitioner's counsel below. Almost month by month, they made the same contacts with the court concerning a trial date. However, in *Schmitt*, the reviewing court found that the plaintiff had exercised reasonable diligence and was allowed to proceed to trial.

Equal protection under the Fourteenth Amendment was explained by this Court in *Truax v. Corrigan*, 257 U.S. 312, 332, 66 L.Ed. 254, 263, 42 S.C. 124, 129 (1921):

> While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis.

There is no "real and substantial distinction, bearing a reasonable and just relation" to dismissing Petitioner's case when allowing the *Schmitt* plaintiff to proceed to trial. The refusal to follow *Schmitt* can only be explained by the improper purpose of clearing a docket, in violation of Petitioner's Fourteenth Amendment rights.

B. PETITIONER WAS DENIED DUE PROCESS WHEN HIS CASE WAS DISMISSED ON THE EVE OF HIS SCHEDULED TRIAL FOR THE PURPORTED REASON THAT HE HAD FAILED TO OBTAIN AN EARLIER TRIAL DATE, NOTWITHSTANDING COURT ERRORS AND PRACTICES WHICH PREVENTED AN EARLIER DATE.

The Court of Appeal states "A trial date could have easily been obtained merely by the filing of a motion to set the case for trial." (App. 14-15.) Since Petitioner had obtained a trial date, the Court's statement must intend to mean that he could have obtained an **earlier** trial date by filing a motion to set.

The only evidence in the record on this issue is contained in declarations by Petitioner's two attorneys which were filed in opposition to the dismissal motion explaining that, because of case overload, motions to specially set matters for trial are regularly denied in the Los Angeles Superior Court if such motions are brought sooner than five months prior to the limitation date. Therefore, the earliest a motion to specially set would have been entertained would have been in late July, 1989, five months before the date for mandatory dismissal. On August 18, 1989, Petitioner's counsel visited the court clerk to obtain a date for a motion to specially set the matter for trial. The clerk suggested that, rather than filing a motion, counsel could request a status conference to obtain a trial date. Petitioner's counsel then requested a status conference which was set by the court clerk for September 28, 1989, three months prior to the mandatory dismissal. At the status conference, the court assigned a trial date of November 27, 1989, one month prior to the limitation period, without objection from Respondents.

Although no evidence or argument was submitted to rebut the assertions of Petitioner's counsel that the Los Angeles Superior Courts deny motions to specially set

which are brought sooner than five months prior to the limitation period, the reviewing court considered Petitioner's conduct in conformance with that practice as waiting until the "eleventh hour" to take action. (App. 16.) However, the timing of Petitioner's action to specially obtain a trial date when one did not come through the regular processes of the court is not viewed as an "eleventh hour" act by other courts.

For example, in *Dick v. Superior Court of Los Angeles County*, 185 Cal.App.3d 1159, 230 Cal.Rptr. 297 (1986), the plaintiff filed a motion to set which was heard **six weeks** before the five year limitation date (he had earlier filed at-issue memoranda which had not resulted in a trial date). The trial court denied the motion to set.[5] The reviewing court mandated the setting of a trial date, stating, "We . . . cannot agree that petitioner's failure to move for trial preference earlier showed a failure of diligence on his part." *Id.* at Cal.App.3d 1166.

In *Salas v. Sears, Roebuck & Company*, 42 Cal.3d 342, 350, 228 Cal.Rptr. 504, 509 (1986), the California Supreme Court acknowledged the practice of filing a motion to set for trial just a short time before the limitation period:

> In many instances – particularly when [an initial] . . . motion for preferential trial setting is made several months before the five-year deadline – **there will remain ample time for a plaintiff to prepare his case for trial and submit a second motion for trial preference** on the basis that the case will otherwise face dismissal. By this means, a plaintiff may avoid the severe

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[5] A motion to specially set for trial raises the same issues for the trial court as a motion to dismiss for failure to prosecute. *Salas v. Sears, Roebuck & Company*, 42 Cal.3d 342, 346, 228 Cal.Rptr. 504, 506, 721 P.2d 590.

consequences of dismissal under either subdivision (a) or (b) of section 583.[6]

(Emphasis added.)

In summary, Petitioner's attorneys' declarations concerning the practice of the Los Angeles Superior Court to deny motions to set which are filed more than five months prior to the limitation period were not rebutted below nor on appeal. These statements are the only evidence in the record on this issue.

Moreover, plaintiff's conduct in setting a status conference for a date three months prior to the three year limitation period in order to obtain a trial date is far in advance of the later time periods approved in *Dick* and *Salas*.

The reviewing court's opinion construing plaintiff's conduct in setting a status conference three months prior to the limitation period as an "eleventh hour" effort is contrary to the facts and the law on this issue. Affirming the dismissal on this basis while ignoring the court's errors in handling Petitioner's court file is merely another example of reaching for any straw to clear the court's docket, in violation of Petitioner's Fourteenth Amendment rights.

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[6] The *Salas* Court explains that former California Code of Procedure Section 583(b) (relating to mandatory dismissals) has been repealed but reenacted in Sections 583.310-583.360, and that former Section 583(a) (relating to discretionary dismissals) was reenacted in Section 583.410, and the court's "analysis [of the repealed sections] will apply to the current statutory scheme as well." *Salas*, 42 Cal.3d at 505, notes 1 and 2.

C. PETITIONER WAS DENIED DUE PROCESS WHEN THE REVIEWING COURT BASED ITS AFFIRMATION OF THE TRIAL COURT DISMISSAL ON AN ISSUE WHICH HAD NOT BEEN RAISED OR CONSIDERED IN THE TRIAL COURT.

In order for a case to be placed on the court's "civil active" list to be assigned a trial date, a plaintiff must file an "at-issue memorandum". Cal.Rules of Court, Rule 209(a) (App. 24). In 1981, Petitioner filed an at-issue memorandum. After the remittitur from his prior appeal, Petitioner's counsel telephoned and twice visited the court clerk's office to inquire about a trial date. The reviewing court dismissed plaintiff's informal actions in attempting to obtain a trial date as insufficient, stating, "The rules of court appear to require that the plaintiff take some formal action such as filing . . . (a new) at-issue memorandum[7] . . . " (App. 14.)

On rehearing, Petitioner argued that the filing of a new at-issue memorandum was not raised in the trial court, therefore, the record on appeal contains only minimal evidence on that subject. The evidence consists of a copy of Petitioner's at-issue memorandum filed in 1981,

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[7] The reviewing court states that "The remittitur in and of itself does not restore a matter to the civil active list." (App. 13.) In support of this statement, the court in a footnote cites *Mesler v. Bragg Management Co.*, (1990) 219 Cal.App. 3d 983 and states " . . . following the filing of a remittitur, [the *Mesler*] plaintiff filed **another** at-issue memorandum." [Emphasis added.] This statement is an absolute misreading of the case. The mention of the at-issue memoranda in *Mesler* arises in the context of setting out the procedural history in the case. The **requirement** for filing an at-issue memorandum was not at issue in *Mesler*, and the at-issue memoranda filed by the *Mesler* plaintiff were necessarily filed following the remittitur, in that none had been filed prior to the earlier adverse judgment.

prior to the earlier appeal and remittitur; the setting of a trial date by the court; and a statement by Petitioner's counsel in a declaration opposing the motion to dismiss concerning a conversation with the court calendar clerks (which indicated their reliance on the 1981 at-issue memorandum) that:

> After the clerks reviewed the files they concluded that Dr. Stafford's case should have been returned to the civil-active list after the court received the notice that he won his appeal, but because of the consolidation, the notice was inadvertently filed in the wrong court file.

Had the issue been raised in the trial court, Petitioner could have obtained statements from the court clerks and offered evidence explaining his reasons for not filing a second at issue memorandum after the remittitur. For example, California Rule of Court 210 provides that:

> The court shall maintain a record of all cases in which an at-issue memorandum has been filed. The record shall be known as the civil active list and shall be arranged in the order in which the at-issue memoranda were filed. (App. 25.)

Therefore, if the April 14, 1981 at-issue memorandum remained valid,[8] it would give Petitioner trial precedence

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[8] California Rule of Court 223, cited by the Court in its opinion, does not dispose of the issue of whether Petitioner's 1981 at-issue memorandum remained valid after the remittitur. The rule states:

> A case shall not be removed from the civil active list except by order of court on stipulation of the parties or by order of court on the court's motion or on a party's noticed motion. A case may be restored to the civil active list only by filing a new at-issue memorandum or by order of court. (App. 25.)

The above rule does not contemplate the circumstance of remittitur after an appeal; rather, it is directed toward the day to day operations of the court where matters are ordered off

(Continued on following page)

over all cases in which at-issue memoranda were filed since that date. The filing of a new at-issue memorandum after the 1986 remittitur would place Petitioner behind all cases with earlier at-issue memoranda. Therefore, to get the earliest trial date, it would have been reasonable for Petitioner to file a second at-issue memorandum only if his first was not valid.

On September 22, 1989, the trial court set a trial date in this matter without objection from Respondents. Had either the trial court or Respondents believed that Petitioner's 1981 at-issue memorandum was invalid, Petitioner would not have been assigned a trial date, especially without objection. And, of course, the issue was not even raised in the motion to dismiss. Moreover, on two occasions in 1988, Petitioner's counsel received promises from the court clerk, **based upon the 1981 at-issue memorandum already filed**, that a notice regarding a trial date would be forthcoming.

In summary, the only evidence in the record on the issue of the validity of Petitioner's 1981 at-issue memorandum supports its validity. In affirming the dismissal on the ground that Petitioner failed to file a new at-issue memorandum after the remittitur, the reviewing court

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(Continued from previous page)

calendar because of stipulations of the parties or a plaintiff's transgressions.

Petitioner's case was never "ordered" off calendar; incidental to the prior judgment for defendants, the case was removed from the civil active list. However, the effect of the unqualified reversal of the prior judgment for the defendants was to **vacate** the prior judgment. *Hampton v. Superior Court*, 38 Cal.2d 652, 242 P2d 1 (1952 Cal.) Vacating the prior judgment restores the parties to the position they would have been in had the erroneous order not been made; which is precisely how the court clerks, the trial setting judge and all parties treated Petitioner's 1981 at-issue memorandum.

indicated its uncertainty on this issue by stating "the rules of court **appear** to require . . . [the filing of a new at issue memorandum]." (Emphasis added.) (App. 14.) Moreover, affirming the dismissal on grounds which were not raised in the trial court where Petitioner could have presented evidence was a denial of the most basic elements of due process – notice and prior hearing.

CONCLUSION

On appeal Petitioner contended, *inter alia,* that each matter the trial court was required to consider under Rule 373(e) of the California Rules of Court (App. 25) in ruling on the dismissal motion must be found in his favor. Notwithstanding, the Court of Appeal affirmed the dismissal on highly technical grounds which were not raised in the trial court, where the only evidence in the record supports Petitioner's conduct. The Court misread two cases it relied upon, distinguished a case with facts virtually identical to Petitioner's, and disregarded trial court errors in handling Petitioner's file. The only explanation for such a decision is the misuse of state dismissal statutes as described by Justice Kaufman.

After years of costly litigation to seek redress for a wrongful termination, Petitioner has sadly discovered that his Constitutional rights to due process and equal protection may be arbitrarily denied in a state court system for mere expediency in order to reduce an overloaded court docket. Petitioner asserts that the California judicial system must turn to the state legislature to solve its overload crisis, and not hide behind technical dispositions to ease its burden.

For these reasons, the writ should be granted.

Respectfully submitted,

ARLENE JOYCE
Counsel of Record for Petitioner

APPENDIX

HARRINGTON, FOXX, DUBROW & CANTER
DALE B. GOLDFARB, ESQ.
611 West Sixth Street, 30th Floor
Los Angeles, California 90017
(213) 489-3222

Attorneys for Defendants, BROTMAN MEDICAL CENTER, GENERAL HEALTH SERVICES and ALEXANDER DUBELMAN, M.D.

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

NOVARRO C. STAFFORD, M.D., Plaintiff, v. DR. DAVID M. BROTMAN MEMORIAL HOSPITAL, ALEXANDER DUBELMAN, M.D., GENERAL HEALTH SERVICES, et al., Defendants.	No. C 340 335 ORDER OF DISMISSAL

The Motion of defendants, BROTMAN MEDICAL CENTER, GENERAL HEALTH SERVICES, and ALEXANDER DUBELMAN, M.D., to dismiss this action for failure to prosecute came on regularly for hearing before this court on November 21, 1989. Dale B. Goldfarb of Harrington, Foxx, Dubrow & Canter appeared on behalf of defendants, and Michael Hachigian and Alex Chang

appeared for plaintiff. The court reviewed the declarations, exhibits and other evidence presented by the parties as well as the Points and Authorities, and the court considered the arguments of counsel. Good cause appearing therefrom,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion of defendants, BROTMAN MEDICAL CENTER, GENERAL HEALTH SERVICES and ALEXANDER DUBELMAN, M.D., be and hereby is granted and that said case be and hereby is ordered dismissed in its entirety with prejudice.

IT IS FURTHER ORDERED that defendants, BROTMAN MEDICAL CENTER, GENERAL HEALTH SERVICES and ALEXANDER DUBELMAN, M.D., shall recover their costs from plaintiff, NOVARRO C. STAFFORD, M.D,.

DATED: NOV 29 1989

/s/ VERNON G. FOSTER
JUDGE OF THE SUPERIOR COURT

[MINUTE ORDER - LOS ANGELES SUPERIOR COURT]
12/22/89

VERNON G. FOSTER — N. DIGIAMBATTISTA
D. QUEVEDO CT ATT — NONE

9:00 am C340335
Stafford M.D.
vs.
Brotman Memorial
C/W C 340 333 WHICH IS LEAD CASE

(1) MOTIONS OF PLAINTIFF NAVARRO STAFFORD TO RECONSIDER AND MODIFY COURT'S RULING ON DEFENDANTS' MOTION TO DISMISS; (2) MOTION TO VACATE ORDER DISMISSING CASE; (3) MOTION TO TOLL THREE YEAR STATUTE TO BRING ACTION TO TRIAL.

(1), (2) & (3) DENIED

No bases for CCP 1008(a) motion. No new facts are shown, nor any excuse for failing to assert them in opposition to the motion. No proper grounds or procedure established for a CCP 663(a) motion. Nothing is shown why failure to bring to trial was impractical or futile. The lack of diligence is obvious, as is the prejudice to defendants. Although plaintiff argues that he is not responsible for the deaths, illnesses and lack of availability of witnesses and records, those events are almost inevitable when litigation has been pending for 9 years and concerns events more than 10 years old.

Objections to Declarations:

Chang declaration - sustained
Novarro Stafford declaration - sustained
Hachigian declarations
Sustained: P2:16-18; P3:3-6; P4:1-6
Overruled: P2:21-22; P4:16-29

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

NOVARRO C. STAFFORD, Plaintiff and Appellant, v. BROTMAN MEMORIAL HOSPITAL, et al., Defendants and Respondents.	B047696 (Super. Ct. No. C340335) (Filed JUN 3 1991)

APPEAL from an order of the Superior Court of Los Angeles County. Vernon G. Foster, Judge. Affirmed.

Arlene Joyce for Plaintiff and Appellant.

Harrington, Foxx, Dubrow & Canter, Dale B. Goldfarb, Jennifer N. Pahre, and Jean M. Cabillot for Defendants and Respondents.

Plaintiff Novarro S. Stafford, M.D., a licensed anesthesiologist, appeals from the order dismissing this action in favor of defendants Dr. David M. Brotman Hospital ("Brotman") and Alexander Dubelman, M.D., Brotman's chief of the anesthesiology department. Plaintiff contends that the trial court abused its discretion in granting defendants' motion to dismiss for lack of prosecution under Code of Civil Procedure sections 583.410 and

583.420, subdivision (a)(3)(C), which provides for discretionary dismissal if an action is not brought to trial within two years after an appeal is remanded.[1] We disagree and affirm the trial court's ruling.

FACTS AND PROCEDURAL BACKGROUND

In 1975, pursuant to an oral agreement, plaintiff became a staff anesthesiologist at Brotman. Brotman operated its anesthesiology department on an "open staff" basis in which anesthesiologists worked according to an on-call schedule that rotated staff anesthesiologists to provide services for surgeons operating in the hospital. Plaintiff participated in the anesthesiology department's on-call schedule. In 1980, Brotman changed the anesthesiology department's structure from an "open staff" to a "closed staff." In a "closed staff" structure, only anesthesiologists with specific contracts have staff privileges and are permitted to participate in the on-call schedule. Brotman entered into an exclusive anesthesiology service contract with Dubelman. Plaintiff did not enter into a special contract and his name was removed from the on-call schedule.

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[1] All statutory references are to the Code of Civil Procedure unless otherwise specified.

Plaintiff also appeals "from the denial of plaintiff's motions heard by the Honorable Vernon G. Foster in Department 64 of the Los Angeles Superior Court in December 22, 1989." Heard and denied on that date were motions to reconsider and modify the dismissal, to vacate the order of dismissal and to toll the three year statute. Those orders are not appealable and are subsumed in the appeal from the order of dismissal. (§ 904.1.)

On October 2, 1980, plaintiff filed a complaint against defendants and others for breach of contract, inducing breach of contact, restraint of trade, interference with business relations and interference with prospective economic advantage. Plaintiff alleged that Dubelman entered into a conspiracy to induce Brotman to breach its agreement with plaintiff, thus damaging plaintiff financially and professionally.

The complaint was promptly served, and on November 26, 1980, defendants filed a demurrer and a motion to strike. The demurrer was sustained with leave to amend. On February 25, 1981, plaintiff filed a first amended complaint and on April 3, 1981, defendants answered asserting failure to exhaust administrative remedies as an affirmative defense. On April 14, 1981, plaintiff filed an at-issue memorandum.

On October 18, 1982, defendants moved for summary judgment on the grounds that plaintiff failed to exhaust his administrative remedies and failed to allege that he requested an administrative hearing. Defendants also asserted that the court was without jurisdiction until plaintiff obtained a writ to set aside Brotman's closed staff policy. On November 12, 1982, the motion was denied.

On May 2, 1983, this action was consolidated with another action involving identical issues against the same defendants. This second action was brought by Cary G. Brooks, M.D., another anesthesiologist formerly on staff at Brotman ("Brooks action"). The two cases were consolidated under the Brooks action case number.

On December 13, 1983, defendants brought a motion for judgment on the pleadings in the consolidated actions arguing that the trial court lacked jurisdiction because both plaintiffs failed to exhaust their administrative remedies by not petitioning for a writ of mandate under Code of Civil Procedure section 1085. On March 2, 1984, that motion was granted as to each of the plaintiffs actions. In addition, the plaintiff's request for leave to amend was denied. On May 23, 1984, plaintiff appealed from that judgment. The Brooks action became final because no appeal was taken.

On October 21, 1986, this court reversed the judgment and held that when plaintiff's staff privileges were termininated [sic] plaintiff was entitled to an administrative hearing. Because the hearing was denied, plaintiff properly filed his suit for damages based on a contract cause of action. He was not required to exhaust his administrative remedies prior to suing for damages. However, we also held that the decision to close staff at the hospital is quasi-legislative in nature and can be challenged only by traditional mandate. Thus, we concluded that, on remand, the trial court should allow plaintiff an opportunity to amend those portions of his complaint relating to the staff closure to confrom [sic] to section 1085's mandamus petition requirements.[2] On December 22, 1986, the remittitur was filed.

On November 30, 1987, plaintiff served a request for production of documents on Brotman. In December 1987,

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[2] The record shows and plaintiff concedes that he did not amend the first amended complaint. Thus, plaintiff properly proceeded only under his breach of contract cause of action.

plaintiff's attorney, Arlene Joyce, telephoned the court clerk about the status of a trial date and the clerk requested that Joyce call back in a few months since the court's calendaring system was in chaos as a result of the implementation of the fast track system.

On February 16, 1988, plaintiff brought a motion to compel the production of documents. On March 15, 1988, Joyce attended a hearing on the motion to compel and went to the calendar clerk's office to ask about a trial date. The clerk sent Joyce to archives to get the court file where it was found under the Brooks action case number. The clerk told Joyce hat she would receive a notice of trial within six months. In October 1988, Joyce again went to the calendar clerk's office to ask about a trial date, retrieved the file from archives, and was assured by the clerk that she would receive a trial date within six months.

On February 15, 1989, plaintiff substituted in Michael M. Hachigian, a Los Angeles trial lawyer.[3] On May 18, 1989, plaintiff served Brotman Hospital with another request for production of documents. On July 14, 1989, plaintiff filed a motion to compel production of documents. The motion was heard on August 11, 1989, and it was in large part denied. Plaintiff filed a motion for reconsideration on August 18, 1989 and, on the same day, spoke to the court clerk about filing a motion to set the matter for trial. The court clerk suggested that plaintiff set a status conference at which a trial date could be set.

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[3] The substitution of attorney was filed with the court on May 9, 1989.

Plaintiff scheduled a status conference for September 28, 1989, the same date as the hearing on the motion for reconsideration. On September 28, 1989, the court ordered production of documents and set a November 27, 1989 trial date.

On October 17, 1989, defendants brought a motion to dismiss plaintiff's action for lack of prosecution. The motion was supported by defendants' attorney's declarations. On October 25 or 26, 1989, defendants deposed plaintiff and his wife. As of November 3, 1989, defendants had not produced any documents to plaintiff pursuant to court order.[4]

On November 6, 1989, plaintiff opposed the motion to dismiss. He asserted that he had exercised due diligence in prosecuting the action, defendants were not prejudiced, any delay was excusable, and defendants impeded the litigation by failing to comply with discovery orders and using dilatory tactics. The opposition was supported by Joyce's declaration, a declaration from an associate of Hachigian, plaintiff's declaration, and various discovery demands, responses, motions, and rulings.

On November 21, 1989, the trial court granted the motion to dismiss. On December 22, 1989, the trial court denied plaintiff's motions to reconsider and modify the dismissal for lack of prosecution, to vacate the order of dismissal, and to toll the three year statute. The trial court, upon reconsideration, held that there was nothing new or persuasive to change its mind, and that there was

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[4] Defendant's (sic) obtained several discovery orders for defendants to produce documents.

no showing as to why bringing the matter to trial had been impracticable or futile. The court noted that many matters considered in its original ruling were not discussed or answered in the motion for reconsideration, i.e. missing records of the defendants and the court, and the numerous changes in ownership and administration of Brotman. The court found that, as a result of plaintiff's delay and lack of diligence, the defendants were left with no evidence to present in their defense in a trial on the merits. The trial court found that the lack of diligence and the prejudice to defendants was obvious. Moreover, the court found that the prejudice to defendants was almost inevitable in a case that had been pending for nine years and concerned events of more than ten years ago.

Plaintiff timely appealed on January 18, 1990.

DISCUSSION

Plaintiff contends that the trial court abused its discretion in dismissing his action, because he was reasonably diligent in prosecuting the action, his claims are meritorious, defendants significantly contributed to the delay, the court's trial calendar precluded an earlier trial date, and defendants were not prejudiced by the delay. Specifically, he argues that a trial date would have been set in a timely fashion except for the court clerk's errors, and that his attorneys' inquiries as to the trial date constitute due diligence.

On a defendant's motion, a trial court may, in its discretion, dismiss an action for delay in prosecution if the court deems it appropriate under the circumstances. (§ 583.410, subd. (a).) When a judgment is reversed, the

trial court has discretion to dismiss the entire action if it is not brought to trial within two years after the remittitur is filed. (§ 583.420, subd. (a)(3)(C).) Mandatory dismissal is required under these circumstances where the case is not brought to trial within three years of the remittitur. (§ 583.320.) The factors to be considered by the trial court in the review of a discretionary motion to dismiss are set forth in rule 373, subdivision (e) of the California Rules of Court.[5]

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[5] Rule 373(e), in pertinent part, provides: "In ruling on the motion the court shall consider all matters relevant to a proper determination of the motion, including the court's file in the case and the affidavits and declarations and supporting data submitted by the parties . . . ; the diligence in seeking to effect service of process; the extent to which the parties engaged in any settlement negotiations or discussions; the diligence of the parties in pursuing discovery or other pretrial proceedings, including any extraordinary relief sought by either party; the nature and complexity of the case; the law applicable to the case, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case; the nature of any extensions of time or other delay attributable to either party; the condition of the court's calendar and the availability of an earlier trial date if the matter was ready for trial; whether the interests of justice are best served by dismissal or trial of the case; and any other fact or circumstance or trial of the case; and any other fact or circumstance relevant to a fair determination of the issue. The court shall be guided by the policies set forth in section 583.130 of the Code of Civil Procedure." Section 583.130 provides that the plaintiff shall prosecute his case with reasonable diligence and that "all parties shall cooperate in bringing the action to trial or other disposition." It also provides that generally a disposition on the merits is favored over a dismissal for lack of reasonably diligent prosecution.

"When the trial court has ruled on such a motion, ' "unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." ' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331, quoting *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) "The burden is on the party complaining to establish an abuse of discretion. . . . " (*Denham, supra,* at p. 566.) Plaintiff has not met that burden in the case at bar.[6]

"[A] plaintiff has an unavoidable duty to exercise reasonable diligence to insure that a case is brought to trial within statutory time constraints. (*Wilshire Bundy Corp. v. Auerbach* (1991) 228 Cal.App.3d 1280, 1286, mod. 91 Daily Journal D.A.R. 4203.) Plaintiff has the responsibility of reasonable diligence and that includes the responsibility of monitoring the action in the trial court to discover filing, scheduling and calendaring errors. If circumstances would lead a plaintiff to reasonably conclude that the court made a calendaring error, then the plaintiff has to act with special diligence to guarantee that trial is

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[6] The hearing on the motion to dismiss was not reported, although the hearing on the motion for reconsideration was reported. As to the trial court's original ruling, therefore, we apply the principle of appellate practice which presumes that a judgment is correct, indulges all intendments and presumptions to support matters upon which the record is silent, and requires that error be affirmatively shown. (*Denham, supra,* 2 Ca1.3d at p. 564.) We note that plaintiff attempted to set forth the substance of the court's grounds for dismissal in declarations. The objection to these declarations on the grounds that they were hearsay were sustained in the court below and plaintiff does not appeal from that ruling.

set in a timely manner. The nearer the time for mandatory dismissal the greater the diligence required. (*Ibid.*) Any calendaring or other error is within the reasonable control of the diligent plaintiff and can be corrected by bringing a motion to specially set. To hold otherwise would merely reward the dilatory plaintiff at the expense of the system. (*Id.* at p. 1289.) The consequences of any clerk's error may be overcome by a plaintiff's exercise of diligence. (*Id.* at p. 1291.)

Here, the record establishes that plaintiff filed an at-issue memorandum on April 14, 1981, and the case was presumably placed on the civil active list. We cannot determine, from the record on appeal, whether the case was set for mandatory settlement conference or trial. When the judgment for defendant was entered, the case was, of course, removed from the civil active list. On October 21, 1986, we reversed the judgment of the superior court, without express remand to the superior court and without direction. The remittitur was filed on December 22, 1986.

California Rules of Court, rule 223 provides that a case may be restored to the civil active list only by filing a new at-issue memorandum or by order of the court. The remittitur in and of itself does not restore a matter to the civil active list.[7] On remand, plaintiff decided not to amend its complaint as permitted by our decision, but decided to go forward solely on the cause of action for

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[7] See Mesler v. Bragg Management Co. (1990) 219 Cal.App.3d 983, where following the filing of a remittitur, plaintiff filed another at-issue memorandum.

damages without amendment. Plaintiff did not file a new at-issue memorandum, nor did he make a motion to set the matter for trial.

Plaintiff's attempts to characterize his attorney's conversations with court clerks as reasonable diligence were properly rejected by the trial court. At no time did plaintiff take any steps necessary to set the matter for trial. The rules of court appear to require that the plaintiff take some formal action such as filing an at-issue memorandum or motion to set for trial. Even assuming the clerk had a sua sponte obligation to restore the case to the civil active list, plaintiff's actions still do not rise to the level of reasonable diligence.

Plaintiff first inquired about a trial date almost one year after the remittitur was filed. The attorney then let three months pass before another inquiry was made. The attorney then let another six months pass before another inquiry was made. It was not until September 28, 1989, less than three months before the expiration of the statutory period, that plaintiff took any substantive action to get a trial date.[8]

Plaintiff's failure to obtain a trial date, based on informal inquiries of the clerk, put plaintiff on notice that some affirmative action needed to be taken in order to get a trial date. A trial date could have easily been obtained

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[8] We note that during the period from December of 1987 to September 28, 1989, plaintiff filed two motions to compel production of documents which were heard in the assigned court. Presumably the file was available in court for the hearings on these motions.

merely by the filing of a motion to set the case for trial. This was never done.

Any errors of the clerk's office in not providing plaintiff with a trial date were readily ascertainable and correctable by the plaintiff with the exercise of reasonable diligence. Plaintiff cannot be excused from sufficiently monitoring his case to insure that it was brought to trial in a timely manner. Since plaintiff was confronted with a shorter statutory period than under usual circumstances (three years instead of five), even more diligence was required of him. Plaintiff did not reasonably rely on official duty being performed when sufficient time had passed to indicate that official duty was in fact not going to be performed. (*Mesler, supra,* 219 Cal.App.3d at p. 995.) The trial court did not abuse its discretion in determining that plaintiff failed to act with reasonable diligence in obtaining a trial date.

Nor did it abuse its discretion in disregarding plaintiff's other arguments. Plaintiff's problems in retaining an attorney did not cause the delay in obtaining the trial date. In any event, Joyce represented plaintiff throughout most of the relevant period. Defendants' delay in producing documents did not cause the delay in obtaining the trial date. Indeed, the actions plaintiff did take to get a trial date, usually coincided with dates plaintiff was already due in court on his motions to compel. There is also nothing in the record to establish that trial court congestion caused the delay. The record does not establish that plaintiff would not have received a much earlier trial date if he had acted diligently in seeking one. Moreover, the trial court properly found that defendants had been prejudiced by the delay in the form of lost records,

missing and unavailable witnesses, and changes in ownership and administration of the hospital.

Plaintiff relies heavily on *Pomona Federal Plaza, Ltd. v. Investment Concepts, Inc.* (1988) 203 Cal.App.3d 217, for the proposition that a showing of "some excuse" for delay requires reversal in a dismissal for lack of prosecution. *Pomona Federal,* however, is factually inapposite and stands for the proposition that plaintiff's inactivity while allowing multiple defendants to complete discovery in cross-actions is excusable delay where the cross-complaints are not severable. *Pomona Federal* also distinguishes itself from cases in which a plaintiff waits until the eleventh hour to file an at-issue memorandum or bring a motion to specially set as plaintiff did here when, at the eleventh hour, he set a status conference in order to get a trial date. (*Id.* at p. 222.)

Plaintiff also inappropriately relies on *Schmitt v. Superior Court* (1989) 216 Cal.App.3d 453, for the proposition that cumulative errors by the court can constitute an excuse for delay in obtaining a trial date. *Schmitt* is inapposite because the appeal court reversed the dismissal of the case, based on serious mishandling by the clerk in not notifying plaintiff's counsel of a trial setting conference which resulted in its dismissal. The appellate court in *Schmitt* also found lack of prejudice to the real party.

The trial court did not abuse its discretion in dismissing this action and there has been no miscarriage of justice, thus, we do not substitute our opinion for the trial court's. The trial court also considered and properly rejected plaintiff's motion for reconsideration because no new evidence was brought before the court, and nothing

persuasive was presented to change the ruling of dismissal.

DISPOSITION

The judgment of dismissal is affirmed. Defendants shall recover their costs on appeal.

NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

TURNER, P.J.

BOREN, J.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 5 DATE: 06/20/91

Arlene Joyce
752 Norvell Street
El Cerrito, CA. 94530

RE: Stafford, Novarro C.
vs.
Brotman Memorial Hospital
2 Civil B047696
Los Angeles NO. C340335

THE COURT:
Petition for rehearing denied.

Second Appellate District, Division Five, No. B047696
S021976

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

NOVARRO C. STAFFORD, Appellant

v.

BROTMAN MEMORIAL HOSPITAL Et Al., Respondents

FILED AUG 21 1991

Appellant's petition for review DENIED.

LUCAS
Chief Justice

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE SECOND APPELLATE DISTRICT

DIVISION: 5

Arlene Joyce
752 Norvell Street
El Cerrito, CA. 94530

RE: Stafford, Novarro C.
vs.
Brotman Memorial Hospital
2 Civil B047696
Los Angeles NO. C340335

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 06/03/91 is now final.

* * Affirmed In Full. * *

SEP 17 1991

ROBERT N. WILSON, Clerk
By: /s/ Theresa Carter
Deputy Clerk

UNITED STATES CONSTITUTION
Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA CODE OF CIVIL PROCEDURE

Chapter 1.5 [Dismissal for Delay in Prosecution]

Article 1 [Definitions and General Provisions]

§583.130 [State policy]

It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or by rule of court adopted pursuant to statute, the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of this chapter.

CALIFORNIA CODE OF CIVIL PROCEDURE

Chapter 1.5 [Dismissal for Delay in Prosecution]

Article 3 [Mandatory Time for Bringing Action to Trial]

§583.320 [New Trial; Three-Year rule]

(a) If a new trial is granted in the action the action shall again be brought to trial within the following times:

. . .

(3) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within three years after the remittitur is filed by the clerk of the trial court.

§583.340 [Computation of time; Exclusions]

In computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which any of the following conditions existed:

. . .

(c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile.

CALIFORNIA CODE OF CIVIL PROCEDURE

Chapter 1.5 [Dismissal for Delay in Prosecution]

Article 4 [Discretionary Dismissal for Delay]

§583.410 [Authority of court to dismiss; Procedure]

(a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case.

(b) Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council.

§583.420 [Conditions; Computation of time]

(a) The court may not dismiss an action pursuant to this article for delay in prosecution except after one of the following conditions has occurred:

. . .

(3) A new trial is granted and the action is not again brought to trial within the following times:

. . .

(C) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within two years after the remittitur is filed by the clerk of the trial court.

CALIFORNIA RULES OF COURT

Chapter 2 [Civil Trial Court Management Rules]

Part 2 [Caseflow Management]

Rule 209 [Memorandum that civil case is at issue]

(a) [Contents of at-issue memorandum No civil case shall be placed on the civil active list or be set for a trial until it is at issue and a party has served and filed an at-issue memorandum stating (1) the title and number of the case; (2) the nature of the case; (3) that all essential parties have been served with process or appeared and that the case is at issue as to those parties; (4) whether the case is entitled to legal preference, and, if so, a citation to the section of the code or statute granting the preference; (5) whether a jury trial is demanded; (6) the time estimated for trial; and (7) the names, addresses, and telephone numbers of the attorneys for the parties or of parties appearing without counsel.

For purposes of this rule and rule 210, a case may be considered at issue notwithstanding any cross-complaint that is not at issue if the cross-complaint has been on file for six months or more.

This rule shall not affect the authority of the court to order a severance of a cross-complaint purpuant to Code of Civil Procedure section 1048.

Rule 210 [Civil active list]

The court shall maintain a record of all cases in which an at-issue memorandum has been filed. The record shall be known as the civil active list and shall be arranged in the order in which the at-issue memoranda were filed.

Part 3 [Calendar Management]

Rule 223 [Removing and restoring civil active cases]

A case shall not be removed from the civil active list except by order of court on stipulation of the parties or by order of court on the court's motion or on a party's noticed motion. A case may be restored to the civil active list only by filing a new at-issue memorandum or by order of court.

CALIFORNIA RULES OF COURT

Chapter 4 [Particular Motions]

Part 7 [Miscellaneous Motions]

Rule 373 [Motion to dismiss for delay in prosecution]

. . .

(e) In ruling on the motion the court shall consider all matters relevant to a proper determination of the motion, including the court's file in the case and the affidavits and declarations and supporting data submitted by the parties, and, where applicable, the availability of the moving party and other essential parties for service of process; the diligence of the parties in pursuing

discovery or other pretrial proceedings, including any extraordinary relief sought by either party; the nature and complexity of the case; the law applicable to the case, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case; the nature of any extensions of time or other delay attributable to either party; the condition of the court's calendar and the availability of an earlier trial date if the matter was ready for trial; whether the interests of justice are best served by dismissal or trial of the case; and any other fact or circumstance relevant to a fair determination of the issue. The court shall be guided by the policies set forth in section 583.130 of the Code of Civil Procedure.

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(2)

No. 91-817

In The

Supreme Court of the United States

October Term, 1991

NOVARRO C. STAFFORD, M.D.,

Petitioner,

v.

BROTMAN MEDICAL CENTER, ALEXANDER DUBELMAN, M.D., GENERAL HEALTH SERVICES,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HARRINGTON, FOXX, DUBROW & CANTER
DALE B. GOLDFARB, Counsel of Record
JEAN M. CABILLOT
611 West Sixth Street, 30th Floor
Los Angeles, California 90017
(213) 489-3222

Attorneys for Defendants and Respondents, BROTMAN MEDICAL CENTER, GENERAL HEALTH SERVICES and ALEXANDER DUBELMAN, M.D.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does an interpretation by a California Court of Appeal of a state statute concerning discretionary dismissal for failure to prosecute constitute a federal question?

2. May petitioner allege the existence of a federal question by arguing that a state court's decision interpreting a state statute violated petitioner's rights to due process and equal protection?

3. Has petitioner presented a matter properly reviewable by this Court where the purported federal question asserted in the petition was not raised below, hence was not before the state court when it rendered its decision?

4. Assuming, *arguendo*, that the interpretation of a state civil procedure provision constitutes a federal question, has petitioner established the existence of a conflict between the decision in the present matter and a decision of another state court of last resort, a United States court of appeal, or other decisions of this Court?

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CASES

STATUTES

Brotman Medical Center, General Health Services, and Alexander Dubelman, M.D., Defendants and Respondents, respectfully submit this Brief in Opposition to the petition for a writ of certiorari filed by Novarro C. Stafford, Plaintiff, Appellant, and Petitioner herein.

STATEMENT OF THE CASE

In the present petition for writ of certiorari, petitioner, who has pursued this matter on and off for more than a decade, disingenuously attempts to argue that the interpretation of a state statute by a state court presents a federal question appropriate for review by this Court. Petitioner has never before argued the existence of a federal question, thus the state courts which have ruled on this case have not decided any question of federal law.

Petitioner, Novarro C. Stafford (hereinafter sometimes referred to as "Stafford"), brought an action against Brotman Medical Center, General Health Services, and Alexander Dubelman, M.D. (hereinafter sometimes referred to collectively as "Brotman"), alleging that he was wrongfully excluded from the rotation for the anesthesiology department after Brotman decided to close its anesthesiology staff.[1]

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[1] California law clearly allows a hospital to close any of its departments. *Mateo-Woodburn v. Fresno Community Hospital & Medical Center*, 221 Cal. App.3d 1169 (1990). The decision to close a department of a hospital is a quasi-legislative decision, which sets forth a rule to be applied in all future cases, as

(Continued on following page)

Stafford's action was filed on October 2, 1980, and dismissed pursuant to Brotman's motion for judgment on the pleadings, which was granted on March 2, 1984. Stafford appealed the trial court judgment, and the court of appeal determined that the trial court should have afforded Stafford an opportunity to amend his complaint to state a cause of action, and, upon those grounds, the action was remanded to the trial court on October 21, 1986, and the remittitur was filed on December 22, 1986.

After the remittitur on the court of appeal's decision, Stafford had a period of three years in which to bring his case to trial.[2] On November 21, 1989, when the action was over nine years old, and approximately one month before the action was subject to mandatory dismissal for failure to prosecute, the trial court granted Brotman's motion to dismiss for failure to prosecute.[3]

(Continued from previous page)

opposed to a quasi-judicial decision, which involves the application of a decision to a specific set of existing facts. *Anton v. San Antonio Community Hospital*, 19 Cal.3d 802 (1977). A court will not set aside a quasi-legislative decision "unless it is substantively irrational, unlawful, contrary to established public policy, or procedurally unfair." *Centeno v. Roseville Community Hospital*, 107 Cal.App.3d 62, at 73 (1979).

[2] California *Code of Civil Procedure*, Section 583.320, provides that an action which is remanded for a new trial by the court of appeal is subject to mandatory dismissal for failure to prosecute if it is not brought to trial within three years after the filing of the remittitur. A discretionary motion to dismiss for failure to prosecute may be brought, under California *Code of Civil Procedure*, Section 583.420, two years after the remittitur is filed.

[3] For the first two years after the remand of the case, Stafford's only actions in furtherance of the litigation were the

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Stafford once again appealed the trial court's ruling, but the ruling on the motion to dismiss was upheld by the trial court on a motion to reconsider, then by the court of appeal in a thoughtful and thorough opinion filed on June 3, 1991. On appeal, Stafford argued that he had diligently prosecuted the case, thus the trial court abused its discretion in granting respondents' motion.

Stafford brought a petition for rehearing, again arguing that the matter had been diligently prosecuted, which petition was denied on June 20, 1991.

Next, Stafford petitioned for review of this matter by the California Supreme Court. Petitioner abandoned his previous arguments, and created new theories in order to justify the attention of the California Supreme Court. In his petition, Stafford contended that a conflict existed among the state courts regarding how to weigh the various factors to be considered in determining whether a discretionary motion to dismiss should be granted. Although petitioner, in attempting to argue that a conflict

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service of two requests for production of documents, the first in 1987, the second in 1989, each of which resulted in a motion to compel production. No other discovery whatsoever was initiated by Stafford after the date of the remand. Further, Stafford never filed an at-issue memorandum, which would signal the court that the case was ready to be set at trial, nor did he bring a motion to obtain a trial date. Stafford did not so much as informally seek the scheduling of a trial date until the subject was raised at a status conference on September 28, 1989, barely three months before the expiration of the three-year period for mandatory dismissal.

existed, utilized the appropriate catch phrases, his petition was denied by the California Supreme Court on August 21, 1991.

Stafford has now sought review of his case by this Court. As with his petition before the California Supreme Court, Stafford has attempted to find some grounds for review by this Court which create the impression that a federal question exists. Stafford's petition appears to contend that his rights to due process and equal protection were violated by the application of the California *Code of Civil Procedure*, Section 583.420. Obviously, any aggrieved party which disputes an adverse ruling can claim that the statutory basis for the ruling is unfair, thus implicating, in some nebulous way, the unhappy litigant's Fourteenth Amendment rights.

In the present matter, however, the statute at issue is simply a procedural provision for governing the passage of cases through the court system. No substantive statute is involved. Further, petitioner had control of the litigation of his action, thus could have avoided the possibility of dismissal merely by causing the matter to be tried within two years after the remittitur was filed.[4]

Thus, Stafford has not presented any issue which is appropriate for consideration by this Court.

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[4] The action would have been over eight years old even if it had been brought to trial two years after the remittitur.

ARGUMENT

1. STAFFORD HAS FAILED TO STATE ANY LEGITIMATE GROUNDS FOR REVIEW BY THIS COURT OF THE CALIFORNIA COURT OF APPEAL DECISION.

The *Rules of the Supreme Court of the United States*, Rule 10.1., states that review by this Court of a state court decision is proper:

> "(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

This Court's decisions regarding whether to grant petitions for certiorari are wholly discretionary. *Durham v. U.S.*, 91 S.Ct. 858, 401 U.S. 481, 28 L.Ed.2d 200 (1971). Such discretionary petitions will be granted only where there are special and important matters to be addressed by the Court. *Fay v. Noia*, 83 S.Ct. 822, 372 U.S. 391, 9 L.Ed.2d 837 (1963).

Where the federal question forming the basis for a petition for certiorari is not raised when the matter is addressed by the state courts, the question is not open in proceeding on a petition for certiorari. *Ellis v. Dixon*, 75 S.Ct. 850, 349 U.S. 458, 99 L.Ed. 1231 (1955), rehearing denied 76 S.Ct. 37, 350 U.S. 855, 100 L.Ed. 759 (1955).

In the present matter, petitioner did not assert the existence of a federal question until the present petition to this Court. Thus, no federal question was addressed by the California courts and there are no grounds for review by this Court of the state court's decision.

2. CONTRARY TO THE REPRESENTATIONS CONTAINED IN STAFFORD'S PETITION FOR WRIT OF CERTIORARI, HE NEVER RAISED ANY QUESTION OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION PRIOR TO THE FILING OF THE PRESENT PETITION TO THIS COURT.

Rule 14(h) of the *Rules of the Supreme Court of the United States* provides that a petitioner specify the stage of the proceedings at which the federal questions sought to be reviewed were raised.

Petitioner has not, and cannot, provide the Court with such information in that the federal questions which petitioner purports to raise here were not asserted below.

At page 11, footnote 1, of his petition, Stafford makes the following statement with respect to his failure to raise these questions below:

> "This Court must recognize that civil litigants in routine state court proceedings do not explicitly invoke their Fourteenth Amendment rights regarding the application of routine state procedural law."

Thus, petitioner admits that he did not raise in the courts below the federal questions which he now asserts.

Petitioner has included quotations from his various briefs and petitions which he has characterized as evidence that he implicitly asserted his rights to due process and equal protection. The quotations, however, do nothing more than illustrate how petitioner failed to adequately raise any such federal question below.

Indeed, each of the arguments contained in petitioner's brief to the court of appeal and his petition for rehearing merely discuss the actions taken by petitioner in litigating the matter prior to the dismissal, in an attempt to demonstrate that the matter was pursued with sufficient diligence.

In his petition to the California Supreme Court, petitioner changed his arguments entirely. There he argued exclusively that there were conflicts in the decisions rendered by the California courts interpreting the standards for discretionary dismissal.

While petitioner's contention that the application of admittedly "routine" state procedural law to his "routine" action violated his Fourteenth Amendment rights is questionable at best, the Court need not reach that stage of the analysis.

Petitioner's argument for a lenient construction of Rule 14(h) is insupportable. Stafford asks this Court to broaden its jurisdiction to address matters never considered by the courts below. As this matter has wound its way through the courts, petitioner created new arguments in obvious attempts to bring the matter within the jurisdiction of those courts. While petitioner has shown great creativity, the courts below were not privy to those

arguments, thus could not have based their decisions on those arguments.

Regardless of whether he raised the existence of a federal question at the trial level, petitioner had ample opportunity to make such an argument before the court of appeal, or upon his petition for rehearing, or upon his petition for review by the California Supreme Court. In that petitioner did not put a federal question before the courts below, their decisions could not have been based upon any purported violation of petitioner's rights to due process and equal protection. Therefore, petitioner is not entitled to a review of the state court's decision by this Court.

3. NONE OF PETITIONER'S REASONS FOR GRANTING THE WRIT SETS FORTH AN IMPORTANT QUESTION OF FEDERAL LAW APPROPRIATE FOR CONSIDERATION BY THIS COURT.

Petitioner has set forth the following reasons for granting his petition:

> 1. In violation of litigants' due process rights, the overloaded court system in California uses highly technical dismissals to reduce its case-load;
>
> 2. In violation of litigants' due process and equal protection rights, proceeding to trial on the merits in California depends more upon the "luck of the draw" than upon the circumstances of the case;
>
> 3. The petition presents the Court with an opportunity to address the violation of litigants' due process and equal protection rights which

arise out of the state courts' use of the dismissal statutes for improper purposes.

As discussed above, none of these arguments have been presented to the courts below, thus should not be addressed by this Court.

Further, while it is obvious that petitioner has labored to frame his situation in terms which apparently pertain to important federal question, his presentation of these issues are at odds with the reality of petitioner's situation.

More than nine years had passed since the filing of Stafford's action when it was dismissed for failure to prosecute. When respondents' motion was heard, the case was one month away from being subject to mandatory dismissal.

Petitioner, in his papers below, blamed the courts, the court clerks, and respondents for his delays. Yet it was the responsibility of petitioner, and no one else, to bring the action to trial. Petitioner never argued, nor could he have argued, that he was actually prevented from bringing the case to trial at any time.[5] Had petitioner taken the necessary steps to try his case in an expedient manner, respondents would not have been in a position to seek, let alone secure, dismissal of the action for failure to prosecute.

Petitioner was in complete control of the progress of his suit, and was not a casualty of the "luck of the draw"

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[5] In fact, respondents did not oppose petitioner's eleventh-hour attempt to secure a trial date.

or of "highly technical" dismissal statutes. Litigants in California, as in every other state, are required to comply with the state's provisions governing the progress of lawsuits.

Petitioner has not directly challenged the constitutionality of the statute, although he appears to argue that there should be no discretionary statutes whatsoever in that there is a potential that they will be unevenly applied. This fanciful argument, which constitutes the basis of the present petition, was never raised prior to the filing of the present petition. Therefore, Stafford is not entitled to a review by this Court of the court of appeal's opinion.

CONCLUSION

For all of the reasons discussed above and in the court of appeal's opinion, this Court should deny this petition for a writ of certiorari.

DATED: December 18, 1991

Respectfully submitted,

HARRINGTON, FOXX, DUBROW & CANTER
DALE B. GOLDFARB, Counsel of Record
JEAN M. CABILLOT

Attorneys for Defendants and Respondents, Brotman Medical Center, General Health Services, and Alexander Dubelman, M.D.